

## REMARKS

In the above referenced Office Action, the previously indicated allowance of Claims 1-20 has been withdrawn in view of newly cited references. Prosecution on the merits is reopened and Claims 1-20 remain pending. Applicant respectfully requests reconsideration by the Examiner in light of the following remarks.

### I. Objection to oath/declaration

The Examiner states that the declaration does not comply with 37 CFR 1.63 (a). However, this objection is moot in view of the January 22, 2008 notice from the United States Patent and Trademark Office (Office), titled "Duty of Disclosure Language set forth in Oaths or Declarations Filed in Nonprovisional Patent Applications." The notice from the Office contains a revised procedure which states that:

"for pending applications, the Office is hereby *sua sponte* waiving the express language requirement of 37 CFR 1.63(b)(3), where the oath or declaration was filed prior to June 1, 2008."

Therefore, Applicant respectfully requests withdrawal of the objection to the declaration.

### II. Rejection Under 35 USC §102/35 USC §103 (Sloman and Schloss)

Claims 1, 11, and 12 are rejected under 35 USC 102(b) as being anticipated by Sloman et al. (EP 1 136 098 A2, hereinafter "Sloman") or in the alternative by Schloss (US 6,456,882, hereinafter "Schloss"). Claims 2-10 and 13-20 are rejected under 35 USC 103(a) as being unpatentable over Sloman in view of Schloss and/or over Schloss in view of Sloman. Applicant respectfully traverses.

In order to expedite prosecution, Applicant has amended Claims 1 and 11 to clarify that the monitoring of indicators which suggest a likely change in pacing threshold is performed as an alternative to conducting a pacing threshold test. Thus in the present application, modification of the safety margin is

facilitated even when a failure to capture may not be identifiable with a threshold test. None of the cited references teach, suggest, or imply monitoring for indicators that suggest a likely change in pacing threshold in the absence of a pacing threshold search and modifying a safety factor used in setting a pulse energy if an indicator of a changed pacing threshold is detected as stated, for example, in Claim 1. Contrary to the Examiner's assertion, the teachings of the Sloman reference explicitly disclose that the safety margin adjustment of the stimulation pulse energy is based on a statistical model generated from capture threshold tests. See *e.g.* col. 3, lines 17-20, col. 4, lines 6-13. Likewise with respect to the Schloss reference, the change in the safety margin is based upon the frequency of capture which is determined from threshold testing. See col. 3, lines 22-26. In the present application, when an indicator of a likely increase in pacing threshold is monitored, a safety factor used in setting a pulse energy is increased. Accordingly, the indicator of a likely increase in pacing energy serves as an alternative to performing a pacing threshold test to facilitate increasing the pacing threshold even in situations where the pacing threshold test may not be successfully performed. Furthermore, the disclosure of the Sloman reference teaches away from the present application because the reference suggests that even when the threshold is less stable, threshold tests are still viable and that they need only be performed more frequently.

Accordingly, Applicant respectfully asserts that the rejection under 35 USC 102(b) of the pending claims as anticipated by or under 35 USC 103(a) as unpatentable over Sloman and/or Schloss is improper and should be withdrawn.

### **III. Conclusion**

In view of the foregoing, it is submitted that this application is in condition for allowance. Favorable consideration and prompt allowance of the application are respectfully requested.

The Examiner is invited to telephone the undersigned if the Examiner believes it would be useful to advance prosecution.

Respectfully submitted,

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Date

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